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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

AUG 18 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of )

TELEPHONE AND DATA )  
SYSTEMS, INC. )

No. 10209-CL-P-715-B-88

For Authority to Construct and )  
Operate a Domestic Cellular )  
Radio Telecommunications )  
System on Frequency Block B )  
to serve the Wisconsin 8 - )  
Vernon Rural Service Area; )  
Market No. 715 )

To: The Commission, en banc

**SUPPLEMENT TO APPLICATION FOR REVIEW**

Century Cellunet, Inc. (Century), Contel Cellular, Inc. (Contel), Coon Valley Farmers Telephone Company, Inc. (CVF), Farmers Telephone Company (FTC), Hillsboro Telephone Company (HTC), LaValle Telephone Cooperative (LTC), Monroe County Telephone Company (MCTC), Mount Horeb Telephone Company (MHTC), North-West Cellular, Inc. (NWC), Richland-Grant Telephone Cooperative, Inc. (RGTC), Vernon Telephone Cooperative (Vernon) and Viroqua Telephone Company (Viroqua) (hereinafter sometimes referred to collectively as the "Settling Partners"), by their attorney, respectfully supplement their pending Application for Review in the captioned proceeding, in light of the Commission's findings and conclusions in the LaStar decision in File No. 27161-CL-P-83, et al., FCC 92-243, adopted June 5, 1992 and released

June 15, 1992, 7 FCC Rcd 3762 (FCC 1992). In support thereof, the Settling Partners respectfully show:

In the pending Application for Review, the Settling Partners seek reversal in part of the Order On Reconsideration issued by the Deputy Chief, Common Carrier Bureau, DA 90-1917, adopted December 31, 1990 and released January 15, 1991.<sup>1</sup> The Settling Partners seek reversal of the Recon. Order to the extent that it refused to dismiss Telephone and Data Systems, Inc.'s (TDS') application as defective for violation of §22.921(b)(1) rules (prohibiting cross-ownership of competing applications) and 1.65 of the rules (requiring continuing completeness and accuracy of information contained in pending applications).

Also pending during this time has been the comparative application proceeding in CC Docket No. 90-257 involving the right to provide cellular service in a portion of the New Orleans MSA. The right to provide this service was sought in File No. 27161-CL-P-83 by La Star Cellular Telephone Company, a joint venture owned 51% by SJI Cellular, Inc. and 49% by Star Cellular Telephone Co., an indirect, wholly-owned subsidiary of TDS. La Star's right to do so has been contested in File Nos. 29010-CL-P-83 and 29181-CL-P-85 by New Orleans CGSA, Inc. (NOCGSA), the wireline licensee in remaining portions of the New Orleans MSAs. NOCGSA is

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<sup>1</sup> Telephone and Data Systems, Inc., 6 FCC Rcd 270 (CCB 1991) (hereinafter sometimes cited as the "Recon. Order").

limited partnership indirectly wholly-owned by BellSouth Corporation.

One of the issues designated for hearing in the comparative proceeding was whether TDS (through its wholly-owned subsidiary United States Cellular Corporation or "USCC") actually controlled La Star notwithstanding that TDS beneficially owned only 49% of La Star.<sup>2</sup> The Commission ultimately agreed with the Administrative Law Judge in the case that from the acquisition by TDS in 1987 of its interest in La Star to the present, TDS, through USCC, controlled La Star. FCC 92-243 at ¶40. Accordingly, the Commission dismissed La Star's application as defective, since TDS has no wireline presence in the New Orleans MSA. *Id.* at ¶13.

Additionally, the circumstances shown by the record in the case were such that NOCGSA strenuously argued to the Commission that the La Star principals engaged in misrepresentations to the Commission, and/or exhibited a lack of candor, concerning the control of La Star.<sup>3</sup> Pertinent excerpts of NOCGSA's exceptions to the Commission discussing this issue are annexed hereto and incorporated herein by reference.

In its decision released on June 15, 1992, the Commission specifically stated, in relevant part:

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<sup>2</sup> See Hearing Designation Order, 5 FCC Rcd 3286 (1990).

<sup>3</sup> Exception of NOCGSA to Initial Decision, CC Docket No. 90-257, December 26, 1991.

Because our conclusion ... results in the dismissal of La Star's application, we do not reach the question ... of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star .... Questions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance.<sup>4</sup>

The instant case is clearly a proceeding in which "the other interests of these parties have decisional significance". Indeed, TDS' similar ownership of 49% of UTELCO goes to the very core of the issues in this case. In turn, under a long and unbroken line of Commission precedent, the least that the Commission has done to parties whose principals have engaged in misrepresentation or lack of candor in the course of application proceedings has been to deny all of such parties' pending applications. See, e.g., TeleSTAR, Inc., 3 FCC Rcd 2860 (FCC 1988), aff'd mem. 886 F.2d 442 (D.C.Cir. 1989), cert. den. 111 S.Ct. 49 (1990); Pass Word, Inc., 76 F.C.C.2d 465 (FCC 1980), recon. den. 86 F.C.C.2d 437 (FCC 1981), aff'd per curiam 673 F.2d 1363 (D.C.Cir. 1981), cert. den. 459 U.S. 840 (1982); Superior Communications Co., Inc., 57 F.C.C.2d 772 (FCC 1976).

So, here, in light of the Commission's findings and conclusions in the La Star proceeding, grant of the cap-

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<sup>4</sup> FCC 92-243 at ¶3 & n. 3. As noted earlier, the USCC referred to by the Commission in the quoted excerpt is a wholly-owned subsidiary of the applicant in this case, TDS.

tioned application should be set aside and the application should be denied.<sup>5</sup>

Respectfully submitted,

CENTURY CELLUNET, INC.  
CONTEL CELLULAR, INC.  
COON VALLEY FARMERS TELEPHONE  
COMPANY, INC.  
FARMERS TELEPHONE COMPANY  
HILLSBORO TELEPHONE COMPANY  
LAVALLE TELEPHONE COOPERATIVE  
MONROE COUNTY TELEPHONE COMPANY  
MOUNT HOREB TELEPHONE COMPANY  
NORTH-WEST CELLULAR, INC.  
RICHLAND-GRANT TELEPHONE  
COOPERATIVE, INC.  
VERNON TELEPHONE COOPERATIVE  
and  
VIROQUA TELEPHONE COMPANY

By

  
Kenneth E. Hardman

Their Attorney

Kenneth E. Hardman, P.C.  
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August 18, 1992

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<sup>5</sup> The Settling Partners also note that the instant application remains a "pending application" for purposes of §1.65 of the rules, and that under §1.65 "whenever there has been a substantial change as to any ... matter which may be of decisional significance in a ... pending application," TDS is required to submit a statement within 30 days "furnishing such additional or corrected information as may be appropriate". So far as the Settling Parties are aware, TDS has not furnished any such statement in this case and evidently has no intention of doing so.

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Before the  
**Federal Communications Commission**

Washington, D.C. 20554

In re Applications of	)	CC Docket No. 90-257
	)	
LA STAR CELLULAR TELEPHONE	)	File No. 27161-CL-P-83
COMPANY	)	
	)	
For a Construction Permit for Facilities	)	
Operating on Block B in the Domestic	)	
Public Cellular Radio Telecommunications	)	
Service in the New Orleans, Louisiana	)	
MSA	)	
	)	
and	)	
	)	
NEW ORLEANS CGSA, INC.	)	File No. 29010-CL-P-83
	)	
To Amend Its Construction Permit for	)	File No. 29181-CL-P-85
Facilities Operating on Block B in the	)	
Domestic Public Cellular Radio Telecom-	)	
munications Service. Call Sign KNKA224,	)	
in the New Orleans, Louisiana MSA	)	
TO: The Commission		

**EXCEPTION OF NOCGSA TO INITIAL DECISION**

NEW ORLEANS CGSA, INC.

L. Andrew Tollin  
Pierre J. LaForce  
Luisa L. Lancetti

WILKINSON, BARKER, KNAUER & QUINN  
1735 New York Avenue, N.W.  
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(202) 783-4141

December 26, 1991

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only the ineligible partner had 'active input' and participated in the prosecution of La Star's application. <sup>27/</sup>

### ISSUE PRESENTED

Whether the Presiding Officer erred in not specifically addressing the repeated lack of candor of La Star principals in testimony at the hearing concerning the true controlling partner of La Star.

### EXCEPTION AND ARGUMENT

#### I. THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE ADDRESSED WHETHER LA STAR WITNESSES LACKED CANDOR AT THE HEARING

In David Ortiz Radio Corp. v. FCC, <sup>28/</sup> the Court of Appeals found that the Commission had an obligation to address a misrepresentation/lack of candor issue where the conduct raised serious character questions, and where the conduct was brought to the attention of the Commission. <sup>29/</sup> This is such a case.

There is no doubt that NOCGSA raised misrepresentation/lack of candor issues in its Proposed Findings concerning the conduct of La Star witnesses at hearing. <sup>30/</sup> In addition, it is clear that the instant case meets all of the requirements set out in RKO General <sup>31/</sup> for considering misrepresentation/lack of candor without issuance of a separate designation order. <sup>32/</sup> The conduct was "blatant and egregious" and

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<sup>27/</sup> I.D., Conclusions at ¶ 219 (emphasis in original).

<sup>28/</sup> 941 F.2d 1253 (D.C. Cir. 1991).

<sup>29/</sup> Id. at 1260.

<sup>30/</sup> See NOCGSA Proposed Findings at ¶¶ 76-123.

<sup>31/</sup> RKO General, Inc. v. FCC, 670 F.2d 215, 235 (D.C. Cir. 1981), cert. denied, 456 U.S. 957 (1982). See Silver Star, 3 FCC Rcd. 6342, 6350 (Rev. Bd. 1988); and William Rogers, 92 FCC 2d 187, 199 (1982).

<sup>32/</sup> See NOCGSA Proposed Findings at ¶¶ 134-137.

was made directly before the trier of fact. Moreover, nothing remains to be heard since the La Star witnesses have been examined by their own counsel and NOCGSA counsel about the basis (or lack thereof) for sworn statements in their written direct testimony. Finally, La Star had notice, through NOCGSA's Findings, of the challenged conduct and had an opportunity to, and did in fact, respond on the merits. <sup>33/</sup> Under the foregoing circumstances, the misrepresentation/lack of candor issue should have been expressly addressed by the Administrative Law Judge and appropriate findings entered.

The principles governing disqualification of an applicant for misrepresentation or lack of candor are clear and long-established. The most frequently cited judicial precedent is RKO General, Inc. v. FCC, <sup>34/</sup> where the court confirmed that a Commission licensee or applicant has an affirmative obligation to fully inform the Commission of all relevant facts noting as well that licensees/applicants were not free to play games with the Commission concerning the truthfulness of their representations. <sup>35/</sup> The court specifically abjured any notion that the rules of private litigation governed the disclosure duty owed by a licensee/applicant to the Commission. In that regard, the court held:

[T]he Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well-known. <sup>36/</sup>

In a recent decision, TeleSTAR, Inc., <sup>37/</sup> the Commission reiterated its continuing commitment to licensee/applicant candor and forthrightness with regard to common carriers:

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<sup>33/</sup> See La Star and USCC Reply Findings filed May 3, 1991 at 39-68 and 20-24, respectively.

<sup>34/</sup> 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 957 (1982).

<sup>35/</sup> Id. at 229.

<sup>36/</sup> Id. at 232.

<sup>37/</sup> 3 FCC Rcd. 2860 (1988), aff'd, 886 F.2d 442 (D.C. Cir. 1989), cert. denied, 111 S. Ct. 49 (1990).



[I]t is necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees.

The policies relevant to an applicant's character in the broadcast context differ from those in the common carrier context . . . . but these differences are not pertinent here because the character issues raised involve [applicant's] relationship to the Commission and the integrity of the Commission's processes . . . . <sup>39/</sup>

Application of the foregoing principles to the instant case would have required a conclusion that La Star, through its principals, engaged in disqualifying acts -- misrepresentation and/or lack of the required candor at hearing. The findings and conclusions set out in the I.D. fully support such a determination. The Administrative Law Judge essentially found that the dispositive facts relevant to La Star's eligibility were contrary to representations made by La Star to the Commission in its applications, sworn testimony and other filings that SJI was in control of the enterprise. The record also documents unequivocally a motive for the principals of La Star to be less than forthcoming. <sup>39/</sup>

Specific instances of misrepresentation/lack of candor on the part of La Star's principals at hearing were as follows: <sup>40/</sup>

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<sup>39/</sup> Id. at 2866. Accord PassWord, Inc., 76 FCC 2d 465 (1980), aff'd, 673 F.2d 1363 (D.C. Cir.), cert. denied, 459 U.S. 840 (1982) (Truthfulness is as essential to common carrier applications and reports as it is to those of broadcasters.).

<sup>39/</sup> Both SJI and USCC acknowledged that La Star eligibility depended on a finding of SJI control of La Star. See USCC Appeal filed August 10, 1990 with the Review Board at 3, n.3: "SJI has the requisite wireline presence in the cellular area; Star (owned by USCC) does not. Therefore, La Star's eligibility is dependent upon SJI's control over La Star." See also La Star Ex. 12 at 2.

<sup>40/</sup> All of these instances were raised by NOCGSA in its Proposed Findings at ¶¶ 140-196.

A. Control of La Star through the Management Committee <sup>41/</sup>

From the day that La Star filed its competing application to provide cellular service in the New Orleans MSA, it repeatedly represented to the Commission that SJI, one of the partners in the La Star venture and the wireline eligible party, was in control of La Star. This representation was made in its 1983 and 1987 applications, in sworn testimony of La Star principals presented by La Star at the hearing, and various other La Star filings. <sup>42/</sup>

It is equally clear that from the outset the foregoing representation of control by SJI has been false. This falsity was not based on some legal technicality, obscure regulation or radical change in legal standards. To the contrary, the falsity of the representation was clear, obvious and known to the La Star principals.

Through the direct testimony of John Brady of SJI and Donald Nelson of USCC and La Star's applications and other filings, La Star represented that, "from the very inception of the joint venture, SJI Cellular has been in full and complete control of the venture," through SJI's "control" of the La Star Management Committee. <sup>43/</sup> The ALJ found, however, that "La Star's representations that this Committee has been managing the applicant's day-to-day affairs has been shown to have no basis in fact." <sup>44/</sup> The ALJ found the Management Committee, as a governing body, totally "discredited" <sup>45/</sup> and observed that "the evidence of record overwhelmingly establishes that SJI, the eligible carrier, has never been in control of La Star." <sup>46/</sup> The ALJ further concluded

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<sup>41/</sup> See NOCGSA Proposed Findings at ¶¶ 58-67, 171, and 184-186.

<sup>42/</sup> See, e.g., La Star Motion for Summary Decision filed August 15, 1990. See also NOCGSA Petition to Enlarge Issues filed August 14, 1990.

<sup>43/</sup> La Star Ex. 12 at 3-4; La Star Ex. 15 at 2.

<sup>44/</sup> I.D., Conclusions at ¶ 239 (emphasis added).

<sup>45/</sup> I.D., Conclusions at ¶ 239.

<sup>46/</sup> I.D., Conclusions at ¶ 213 (emphasis added).

that: "from the outset and continuing to the present time the 49% ineligible minority venture partners have been the dominant players;" <sup>47/</sup> "Maxcell's domination of La Star's affairs continued throughout Maxcell's ownership period;" <sup>48/</sup> "Maxcell had carte blanche authority . . .;" <sup>49/</sup> and "from August 1987 to May 1990, the USCC ownership period, USCC was the dominant partner . . . [and] [t]here is no evidence of SJI direction and oversight over the extensive La Star activities which took place. . . ." <sup>50/</sup>

The cross-examination testimony of SJI and USCC witnesses demonstrated that the La Star Management Committee had "met" a grand total of two times from 1983 through 1990. Further, the evidence of record established that, in every material respect, the minority partner in the La Star venture (first, Star Telephone/Maxcell and then, USCC) performed virtually all the business functions of La Star. Most significantly here, the minority ineligible partner was in charge of the La Star application, virtually without participation (and certainly no direction or control) by SJI principals. <sup>51/</sup>

The La Star principals were fully aware of the lack of any kind of meaningful involvement in La Star business affairs by the so-called Management Committee. They were likewise fully aware of the lack of SJI involvement in the affairs of La Star or the prosecution of its St. Tammany application. Notwithstanding this documented awareness, the La Star principals attempted to perpetuate, through sworn testimony herein, the myth of SJI control of La Star through its control of the Management Committee.

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<sup>47/</sup> I.D., Conclusions at ¶ 214.

<sup>48/</sup> I.D., Conclusions at ¶ 217.

<sup>49/</sup> I.D., Conclusions at ¶ 217.

<sup>50/</sup> I.D., Conclusions at ¶ 219.

<sup>51/</sup> I.D., Conclusions at ¶¶ 214-219.

B. SJI Involvement -- La Star Joint Venture Agreement <sup>52/</sup>

As part of the false/inaccurate representation of SJI control over La Star, SJI's chief executive officer, John Brady, testified that he had negotiated the basic terms and conditions of the La Star Joint Venture Agreement with a representative of one of the Star principals, William Erdman of Maxcell. <sup>53/</sup> The real facts, as elicited from Mr. Brady upon cross-examination and through other documentary evidence, were to the contrary. As found by the Administrative Law Judge, the La Star Joint Venture Agreement was almost completely the work product of Maxcell, without input (through negotiations or otherwise) by SJI. <sup>54/</sup> Further, documentary evidence showed that the La Star Joint Venture Agreement was virtually identical to an earlier agreement used by Maxcell with respect to another 49 percent interest it held in an applicant for the Baton Rouge MSA cellular authorization.

Mr. Brady's testimony concerning negotiation of the La Star Joint Venture Agreement was nothing more than an attempt to buttress the La Star contention, essential to the wireline eligibility issue, that SJI was "in charge." Mr. Brady knew there had been no real negotiation of the Joint Venture Agreement, but that, instead, SJI had simply accepted a contract prepared by Maxcell, without any meaningful contribution by SJI. This misrepresentation or lack of candor went to an issue which was substantive and directly relevant to the wireline eligibility question, and was made directly before the

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<sup>52/</sup> See NOCGSA Proposed Findings at ¶¶ 140-151.

<sup>53/</sup> La Star Ex. 12 at 12.

<sup>54/</sup> I.D., Findings at ¶ 214. Initially, Mr. Brady could not recall any modifications to the Joint Venture Agreement which he had negotiated, notwithstanding ample opportunity having been provided by the Administrative Law Judge to identify any such modifications. Brady Tr. at 936-939. The following hearing day, Mr. Brady recalled that he had persuaded Maxcell to include an "escape clause" to the Joint Venture Agreement, allowing either party to require the other to buy out its interest. Id. at 1093. That was virtually the only contribution made by SJI to the Joint Venture Agreement.

trier of fact. Absent cross-examination, it likely would have been relied on by the ALJ in his findings.

C. Preparation of 1983 La Star Application <sup>55/</sup>

To further support the contention that SJI was "in charge," Mr. Brady asserted that he had participated in the preparation of the initial La Star application. <sup>56/</sup> Again, that assertion was without basis. On cross-examination, Mr. Brady admitted (i) that the application had been prepared "by the engineers in conjunction with the lawyer;" (ii) that those engineers did not work for SJI, and (iii) finally, that "Maxcell was in charge of preparing the application." <sup>57/</sup> The other evidence of record likewise showed that SJI had virtually no involvement in the preparation of the 1983 La Star application. The findings made by the Administrative Law Judge in that regard stated it best:

Maxcell prepared and filed La Star's 1983 application using its regular attorney, in-house engineer and outside consultants hired by its attorney. No SJI personnel worked on the application. Brady had nothing to do with their hiring and did not know them . . . . With regard to the La Star financial commitment, Erdman [Maxcell] obtained the loan commitment from a Washington, D.C. bank. Brady did not know anyone at the bank and played no role . . . . In many respects, the La Star 1983 application bears a striking resemblance to Maxcell's Baton Rouge application. Among other things, the same lawyers, engineers and other consultants were used. Also, the same Washington, D.C. bank was used. <sup>58/</sup>

At hearing, Mr. Brady continued to insist that the six-cell system set out in the La Star application had been dictated by him. On cross-examination, however, it was shown that this assertion was simply not credible, given Mr. Brady's complete lack of

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<sup>55/</sup> NOCGSA Proposed Findings at ¶¶ 152-155.

<sup>56/</sup> La Star Ex. 12 at 12.

<sup>57/</sup> Brady Tr. at 863.

<sup>58/</sup> I.D., Conclusions at ¶ 216 (emphasis added).

expertise concerning cellular engineering and cellular systems and his confused (and confusing) testimony concerning his rationale for a six-cell system design. <sup>59/</sup> The ALJ found:

Brady asserts that the six-cell system design was at his "insistence." However, the evidence adduced concerning this assertion, detailed in Findings 40 and 41, demonstrates that Brady's claim lacks credibility and is not accepted. <sup>60/</sup>

Mr. Brady knew that he and SJI had virtually no involvement in the preparation of the 1983 application. Notwithstanding that knowledge, Mr. Brady deliberately attempted to convey an impression of SJI's active participation, an impression which he hoped would persuade the Commission to find for La Star on the wireline eligibility issue. This misrepresentation/lack of candor was made directly to the trier of fact.

**D. SJI Involvement in La Star 1987 Amendment <sup>61/</sup>**

In his direct testimony, Mr. Brady swore that "in 1987, I directed the preparation of La Star's 1987 amendment." <sup>62/</sup> Again, there was no basis for this statement, and the Administrative Law Judge so found:

The record reflects that SJI personnel did no work on La Star's 1987 amendment -- except updating SJI's ownership information -- and USCC basically did everything. <sup>63/</sup>

For example, the record showed that USCC, without any SJI direction, involvement, knowledge or coordination: (i) prepared the rate exhibit; (ii) worked on site matters; (iii) worked with the outside demographic consultant; <sup>64/</sup> (iv) coordinated the engineering

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<sup>59/</sup> See I.D., Findings at ¶¶ 40-41; Conclusions at ¶ 216.

<sup>60/</sup> I.D., Conclusions at ¶ 216.

<sup>61/</sup> NOCGSA Proposed Findings at ¶¶ 156-157.

<sup>62/</sup> La Star Ex. 12 at 14.

<sup>63/</sup> I.D., Findings at ¶ 58 (emphasis added).

<sup>64/</sup> As of the hearing date, this consultant did not know who or what SJI was, or its role in the La Star application. I.D., Findings at ¶ 66.

with La Star's outside engineer; and (v) obtained the financing commitment. This misrepresentation/lack of candor was made directly to the trier of fact.

E. La Star's Cost-Based Rates <sup>65/</sup>

As part of its direct case, La Star submitted a schedule of proposed rates which was co-sponsored and sworn to by Mr. Brady of SJI and Mark Krohse of USCC. <sup>66/</sup> That exhibit stated that the proposed rates were cost-based. <sup>67/</sup> Once again, Mr. Brady's testimony on cross-examination wholly impeached the rate exhibit and his involvement in its preparation. The Presiding Officer found that: "SJI played no role in [the rate schedule] preparation." <sup>68/</sup> The ALJ added that

the rates [were derived] from a USCC book listing cellular rates from operating systems around the Parish. [Cite omitted]. SJI was not consulted about this exhibit and had no knowledge of how the rate schedule was prepared. [Cite omitted]. Specifically, John Brady testified at hearing that he did not know how La Star's proposed rates were calculated or who had calculated them. <sup>69/</sup>

Thus, obviously Mr. Brady's direct testimony that he had reviewed the rate exhibit and it was true and correct was baseless.

F. "Independent" Legal Counsel <sup>70/</sup>

In its post-hearing filings, La Star attempted to elevate the role of its counsel, Arthur Belendiuk, to that of overall manager of the La Star enterprise, contending that everyone who worked on the La Star application (USCC employees, experts, etc.)

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<sup>65/</sup> NOCGSA Proposed Findings at ¶¶ 161-163.

<sup>66/</sup> This was a key exhibit through which La Star hoped to gain a comparative preference.

<sup>67/</sup> La Star Ex. 10 at 1.

<sup>68/</sup> I.D., Findings at ¶ 197.

<sup>69/</sup> I.D., Findings at ¶ 70 (emphasis added).

<sup>70/</sup> NOCGSA Proposed Findings at ¶¶ 164-170.

did so under counsel's direction. <sup>11</sup> (La Star circularly argued that counsel's activities ought to be credited to SJI because SJI controlled La Star). The Administrative Law Judge found that "La Star's assertion of Belendiuk's decision making role cannot be reconciled with Belendiuk's own statements as to the nature of his participation." <sup>12</sup>

The so-called independence of its counsel was also urged by La Star as a basis for finding that SJI was "in charge" of La Star and the application. For example, Mr. Brady's direct testimony emphasized that La Star's counsel worked for La Star, "and not for SJI Cellular or Star individually," adding that La Star's counsel did not work for USCC. <sup>13</sup> What Mr. Brady did not disclose was that La Star's present counsel and his predecessor (William Franklin) both had been selected as counsel for La Star by Maxcell, one of the principals of the "minority" partner from 1983 to 1987. Mr. Brady also did not disclose that, at the time of Mr. Franklin's retention, he was not known to Brady, but that Brady was aware that Mr. Franklin served as counsel to Maxcell. <sup>14</sup> Further, Mr. Brady did not disclose that, when it was decided in 1984 to change legal counsel, selection of Mr. Belendiuk as La Star counsel was made by the General Counsel of Maxcell. As of that time, Brady had not met or worked with Mr. Belendiuk. <sup>15</sup>

At the hearing, La Star's counsel, Mr. Belendiuk, volunteered a stipulation that, at the time he was retained as La Star counsel, he had not done any work for Maxcell. <sup>16</sup> What Mr. Belendiuk did not disclose was that, in 1985, while serving as counsel for La Star, he also filed petitions for review of Commission actions as counsel for

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<sup>11</sup> See I.D., Conclusions at ¶ 220.

<sup>12</sup> I.D., Conclusions at ¶ 221.

<sup>13</sup> La Star Ex. 12 at 4.

<sup>14</sup> I.D., Findings at ¶ 33.

<sup>15</sup> I.D., Findings at ¶ 44.

<sup>16</sup> Brady Tr. at 995.



Maxcell. <sup>77/</sup> Instead, this very salient fact was brought to the attention of the Administrative Law Judge by NOCGSA. Nor did Mr. Belendiuk disclose that he had been selected as La Star's counsel by the General Counsel of Maxcell.

When the foregoing facts are coupled with the undisputed fact that La Star's counsel fees and expenses were totally underwritten by the so-called "minority" partner from 1983 to at least June 1990, it is altogether clear whose servant La Star counsel was from day one. <sup>78/</sup>

Again, Mr. Brady either attempted to mislead the Commission, or he breached his obligation of candor in connection with his assertions (and related non-disclosures) concerning the alleged independence of La Star counsel. If La Star was to make an "issue" of its counsel's independence, it was duty bound to fully inform the Commission. La Star did not do so because, obviously, full disclosure would not have served its purpose.

#### G. SJI Involvement in Cell Site and Tax Matters <sup>79/</sup>

At hearing, Sinclair Crenshaw, house counsel and of SJI another SJI witness, testified that he had direct responsibility "for such matters as cell site renewals and tax matters." In fact, Mr. Crenshaw's involvement was tangential and ministerial at best. The evidence showed that he never participated substantively in such matters, and that he routinely referred such matters to USCC for action. Mr. Crenshaw's direct testimony was completely rebutted by his admissions on cross-examination, by the testimony of USCC witnesses, and by the documentary evidence. <sup>80/</sup> For example,

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<sup>77/</sup> I.D., Findings at ¶ 46; Conclusions at ¶ 222.

<sup>78/</sup> I.D., Conclusions at ¶ 222.

<sup>79/</sup> NOCGSA Proposed Findings at ¶¶ 173-178.

<sup>80/</sup> See I.D., Findings at ¶¶ 73-75, 83-87; Conclusions at ¶ 219.

despite Mr. Crenshaw's testimony that he was the La Star tax matters "contact point," <sup>81/</sup> USCC prepared and filed La Star's tax returns without SJI oversight or knowledge. <sup>82/</sup>

An evidentiary showing that SJI was involved and "in charge" of important business affairs of La Star, such as the acquisition of cell sites for the proposed system and tax matters, was a critical building block in La Star's case that SJI was in control of La Star and the La Star application. It was to that end that Mr. Crenshaw's direct testimony of his "involvement" in cell site and tax matters was directed. The record evidence was overwhelming, here again, that SJI not only exercised no control over cell site and tax matters, it was barely involved.

#### H. Testimony Regarding "Appointment" of La Star's General Manager <sup>83/</sup>

At the hearing, Donald Nelson, President of USCC and a member of the so-called La Star Management Committee, testified that Mr. Brady of SJI had been appointed "General Manager" of La Star, and had been serving in that capacity since 1983. Upon cross-examination and examination by the Administrative Law Judge, it developed that Mr. Nelson had no personal knowledge concerning this matter prior to 1987, and, that instead, he was parroting what counsel had told him. <sup>84/</sup> Upon further cross-examination and examination by the Administrative Law Judge, Mr. Nelson could not identify any specific managerial activities undertaken by Mr. Brady during any period. <sup>85/</sup> Mr. Nelson's direct testimony was obviously geared to show SJI management control of La Star, a key issue in this case. His subsequent admissions on cross-examination

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<sup>81/</sup> I.D., Findings at ¶ 86.

<sup>82/</sup> I.D., Findings at ¶¶ 84-88; Conclusions at ¶ 219.

<sup>83/</sup> NOCGSA Proposed Findings at ¶ 183.

<sup>84/</sup> Nelson Tr. at 1435-1439.

<sup>85/</sup> Nelson Tr. at 1450-1452.

showed that there was no basis in fact for his assertions concerning appointment of Mr. Brady as General Manager.

I. Level of USCC Involvement <sup>86/</sup>

In their testimony, USCC witnesses Messrs. Nelson, Goehring, and Krohse all tried to minimize the level of USCC involvement in the affairs of La Star and in the prosecution of the La Star application. These witnesses contended, inter alia, that USCC was only marginally involved in La Star matters, that La Star activities were under the control of the La Star Management Committee, that SJI directed La Star's affairs, and, conversely, that USCC's involvement in La Star's affairs, including the prosecution of the application, was slight. Cross-examination of these witnesses resulted in full rebuttal of their minimization of the USCC role. This rebuttal was confirmed by documentary evidence obtained from USCC's own files. The Administrative Law Judge concluded that USCC, like Maxcell before it, had dominated the affairs of La Star. Specifically, the Administrative Law Judge found:

[F]rom August 1987 to May 1990, the USCC ownership period, USCC was the dominant partner. There is no evidence of SJI direction and oversight over the extensive La Star activities which took place and in which USCC personnel were involved. For instance, SJI's failure to call meetings (by phone conference or otherwise) or to otherwise communicate with the minority partner was remarkable, especially in view of the multitude of La Star events and the number of activities undertaken by USCC personnel. Contrary to La Star's contention, this was not a situation in which the ineligible partner performed only "ministerial" tasks and the eligible partner did everything else. In this case, only the ineligible partner had "active input" and participated in the prosecution of La Star's application. <sup>87/</sup>

The Administrative Law Judge went on to identify thirteen major business activities of La Star in which USCC was involved. <sup>88/</sup> The Administrative Law Judge

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<sup>86/</sup> NOCGSA Proposed Findings at ¶¶ 181-182; 190-196.

<sup>87/</sup> I.D., Findings at ¶ 219.

<sup>88/</sup> I.D., Findings at ¶ 219.

also found that the La Star Joint Venture Agreement gave the ineligible partner negative control over many La Star matters, as well as total financial responsibility. <sup>89/</sup> Finally, the Administrative Law Judge discredited the notion of substantial involvement in La Star affairs by the La Star Management Committee. <sup>90/</sup>

At Findings 61-90 of the I.D., the Administrative Law Judge discussed, in telling detail, the history of USCC's dominating involvement, to the virtual exclusion of SJI, in the affairs of La Star. All of the USCC witnesses were fully aware of the pervasive dominion and control exercised by USCC over La Star. Likewise, they were aware of the non-involvement of SJI in those affairs. <sup>91/</sup>

### CONCLUSION

For the foregoing reasons, the Presiding Officer should have addressed whether La Star witnesses repeatedly lacked candor at the hearing.

Respectfully submitted,

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Dated: December 26, 1991

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<sup>89/</sup> Id.

<sup>90/</sup> Id.

<sup>91/</sup> Indeed, one of the USCC witnesses, Mr. Goehring, testified at the hearing that he did not know who either SJI or John Brady was. Goehring Tr. at 1478.

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of August, 1992, served the foregoing Supplement to Application for Review upon Telephone and Data Systems, Inc. by mailing a true copy thereof, first class postage prepaid, to its attorney, Peter M. Connolly, Esquire, Koteen & Naftalin, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036.

  
Kenneth E. Hardman